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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of, FRANK J. BURGESS Respondent.	OAH No.: 2014060674 FPPC No.: 12/516 **RESPONDENT'S BRIEF IN RESPONSE TO OPENING BRIEF OF THE ENFORCEMENT DIVISION OF THE FAIR POLITICAL PRACTICES COMMISSION RE: PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE H. STUART WAXMAN** **ORAL ARGUMENT REQUESTED** Date: March 19, 2015 Time: 10:00 a.m. Place: 428 J Street, 8th Floor Hearing Room Sacramento, CA 95814

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I. INTRODUCTION

By the Enforcement Division's own admission, ALJ Waxman's Proposed Decision:

- Is Mistakenly Based on the Wrong Version of the Regulations (i.e. Regulations that didn't even exist during the operative time period, April, 2010) (Opening Brief, p. 11, lines 9 – 23);
- Is Mistakenly Based on Laws and Regulations that are absolutely "irrelevant" to both the charges in the Accusation and the Factual Findings (*See e.g.* Opening Brief pp. 10 & 11);
- Applies the wrong standard in determining "whether [Respondent] violated Government Code section 87100." (Please Compare Regulation 18700 as cited by the Enforcement Division on p. 14:3-15 to ALJ Waxman's Proposed Decision p. 6, ¶ 8);
- "Mistakenly asserts" that the six elements for conflicts of interest violations are "not mandated by statute or regulation" but rather only serve as a "useful tool" in determining liability under that statute." (*See* Opening Brief, p. 13:22-26); and
- Relied on a presumption for establishing the "reasonably foreseeable element" that did not even exist under the 2010 version of the Regulations (*See e.g.* Opening Brief pp. 17:27 – 18:2).

Rather than recommend that the Commission reject the Proposed Decision as it should have done, the Enforcement Division instead asks this Commission to replace the incorrect laws and Regulations that ALJ Waxman obviously reviewed, analyzed, and relied upon to render his Proposed Decision, with their own set of laws and Regulations. Government Code Section 11517, subdivision (c)(2)(C) allows the Commission to make "technical or other minor changes" such as the "typographical errors" identified by the Enforcement Division on page 19 of its Brief. However, Section 11517 does not allow the Commission to change the legal basis of the Proposed Decision, which is precisely what the Enforcement Division seeks to do by characterizing the proposed substantive changes as mere "clarifying changes."

The Enforcement Division's attempt to pass these proposed revisions off as mere "clarifying changes" is misguided and unsupported by the law. The proposed changes clearly affect, and materially change, both the factual and legal basis of the Proposed Decision. The Enforcement Division is asking this Commission to delete the majority of the laws and

Regulations that were analyzed and relied upon by ALJ Waxman to arrive at his Proposed Decision and replace them with their own set of laws and Regulations. By definition, the proposed changes affect the legal basis of the Proposed Decision. Such changes are expressly prohibited by Government Code Section 11517, subdivision (c)(2)(C).

It is undisputed that this matter was analyzed and decided by ALJ Waxman based on the wrong laws and Regulations. As a result, the Commission is bound to follow the law and either deny the charge outright or in very least, after affording the parties the right to make oral and written argument, make its own decision based on the correct law. Govt. Code Section 11571(E). But the Commission cannot, as the Enforcement Division now urges, substitute different laws and regulations into the Proposed Decision and then adopt the ruling as if ALJ Waxman had relied upon these same laws and Regulations. *See e.g. Ventimiglia v. Board of Behavioral Sciences*, 168 Cal. App. 4th 296 (2008) (Petition for writ of administrative mandate granted where changes to the proposed decision affected the factual or legal basis of the proposed decision).

If the Commission is inclined to ignore the law and adopt some version of ALJ Waxman's erroneous Proposed Decision, the proposed penalty needs to be reduced as the facts and circumstances of this case do *not* support the imposition of the maximum penalty of $5,000.00. As addressed further below, Burgess should not be fined at all. But if the Commission is inclined to impose a fine, the penalty should be at most $100.00, as Respondent Burgess was always led by the hospital to believe that he was not subject to the Political Reform Act while acting as a Hospital Board member. Moreover, Respondent Burgess had previously served 12 years on the Banning City Counsel with no prior violations.

II. SINCE RESPONDENT BURGESS WAS ACTING IN HIS CAPACITY AS A MEMBER OF A NONPROFIT CORPORATION (i.e., the "Hospital Board"), HE WAS NOT A PUBLIC OFFCIAL AND WAS NOT INVOLVED IN A GOVERNMENTAL DECISION.

Government Code Section 82048 defines a "public official" as "every member, officer, employee or consultant of a state or local government agency." If an individual is not a public official, then he or she does not have a conflict of interest under the Political Reform Act. (Cal.

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Code of Regs. Section 18626). Likewise, if the individual did not "make, participate in making, or attempt to use his *official position* to influence a *governmental decision*, then there can be no violation under the Political Reform Act." (Government Code Section 87100).

Here, ALJ Waxman essentially concluded that Respondent Burgess was acting as a "public official" and "made, participated in making or attempting to use his official position to influence a governmental decision" because "his membership on the Hospital Board was directly derivative of his district board membership." Importantly, however, this is not the law. *See e.g. Eden Township Healthcare District v. Sutter Health*, 202 Cal. App. 4th 208, 222 (2011). Respondent is not a "public official" just because he served on both boards. Indeed, Responding Party Burgess can only be considered a "public official" if he was acting in his capacity as member of the District's board, not as a board member of the Hospital Board, *which is a nonprofit 501(c)(3) corporation.*

Eden illustrates this point. In *Eden*, a nonprofit corporation formed to operate the hospital for a healthcare district brought an action against the healthcare district for specific performance of a written agreement to convey real property and for damages. *Id.* The Healthcare District cross complained for declaratory and injunctive relief seeking to void the agreement under Government Code sections 1090 and 1092 claiming that Bischalaney, who was both the CEO of the District and president and CEO of the nonprofit health system (for which he received an annual salary in excess of $200,000), had a "paradigmatic conflict of interest" because he actively participated in the negotiation, drafting, approval and execution of the Agreement in which he had a prohibited financial interest. *Id.* at 217. The Nonprofit health system filed a motion for summary judgment arguing that Bischalaney did not participate in the making of the contract in his official capacity for the District, but rather as the President and CEO of the nonprofit health system. *Id.* at 217. The trial court granted the non-profit's motion for summary judgment reasoning that the "District cannot establish that Bischalaney participated in the making of the 2008 Agreements *in his official capacity as District CEO*". *Id.* at 220 (emphasis added). The trial court in *Eden* specifically recognized that acting in the capacity as a board member of a nonprofit health care system is <u>not</u> the same as acting in the official capacity

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as a District Board member. Although the ruling was affirmed on other grounds, the court of appeal agreed with the trial court stating that "Bischalaney's employer, [the nonprofit health system], is not a governmental entity." (*Id.* at 222).

In the instant case, the events at issue relate to Burgess acting in his capacity as a nonprofit Hospital board member, not as a District board member. The proposed contract that was at issue before the nonprofit Hospital Board was between Docu-Trust and the nonprofit Hospital, not the District. Thus, Respondent Burgess was not a "public official" during the events at issue, nor did this involve a "governmental decision." Again, the Hospital is a nonprofit 501(c)(3) corporation, not a governmental entity. *See e.g. Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal. App. 4th 208, 222 (nonprofit healthcare system is "not a governmental entity"). As such, Respondent Burgess did not violate the Political Reform Act.

III. THE CLAIM AGAINST BURGESS IS CONSTITUTIONALLY BARRED.

The government's policies are incurably vague and inconsistent as to whether Burgess is subject to the Political Reform Act in his capacity as a member of the Board of the nonprofit Hospital. The San Gorgonio Memorial Healthcare District is a state chartered healthcare district and a subdivision of the State of California. Health & Safety Code, section 32000 *et seq*. It was formed under the Healthcare District law which is now codified under California Health & Safety Code Section 32000 *et seq*. The San Gorgonio Memorial Hospital is a non-profit Public Benefit Corporation. As stated above, Government Code Section 82048 defines a "public official" as "every member, officer, employee or consultant of a state or local government agency."

The wording of Section 82048 does not state that it applies to nonprofit corporations. To the extent ALJ Waxman attempted to apply Section 82048 to the nonprofit corporations, the statute does not provide fair warning to members of nonprofit corporations that the statutes term "government agency" applies to nonprofits or that by serving as a volunteer on a nonprofit corporation's board that individuals may be deemed to be "public officials" as that term is used in the Political Reform Act.

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Indeed, a plain reading of Section 82048 would lead the average person to conclude that it does not apply to board members of nonprofit corporations. As such, the statute failed to provide fair warning that members of the nonprofit Hospital Board were public officials of a government agency.

Furthermore, Section 4.15 of the San Gorgonio Memorial Hospital Bylaws contains a statement that can only be interpreted to mean that the nonprofit Hospital Board members are not subject to the Political Reform Act. The Bylaws of the San Gorgonio Memorial Hospital adopted on June 2, 2009, which were in effect at the time Mr. Burgess is alleged to have violated the Political Reform Act, provide as follows: "*All members of the Board of Directors will complete a course of training in ethics similar to that required of publically elected officials within the State of California as per Article 2.4 of Chapter 2 of Part 1 of Division 2 of Title 5 of the Government Code.*" [Emphasis added]. The reference to the Government Code is to Section 53234 *et seq.* which require ethics training for public officials. By stating that Board Members should complete ethics training similar to that required of public officials, Mr. Burgess could only conclude that while acting as a board member of the nonprofit, he was not acting as a public official of a government agency. At a minimum, such an interpretation is reasonable. If the Political Reform Act did apply, the Bylaws would have stated that the Board Members shall complete ethics training not similar to – but in accordance with or identical to – those applicable to public officials. Indeed, the Hospital's Bylaws never even mentioned anything about the Political Reform Act until they were Amended on January 4, 2011. The January 4, 2011 version of the Hospital's Bylaws, which were adopted after the events in question, provided that: "*All members of the Board of Directors shall complete a course of training in ethics pursuant to Government Code 54234 (AB 1234)*" and for the first time also included the following provision:

Conflicts of Interest and Other Policies

Section 4.16

Members of the Board of Directors shall comply with the Corporation's Conflicts of Interest Code adopted on November 2, 2010, as it may be amended or

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supplemented from time to time, applicable provisions of the Political Reform Act, Government Code Section 81000, et seq., Government Code Section 1090, et seq. and other policies adopted by the Board, including but not limited to its confidentiality policies.

Again, these provisions did not exist until after the events in question. Thus, although he knew he was subject to the Political Reform Act while sitting on the District Board, Mr. Burgess was led to believe by the District and the Hospital that he was not subject to the Political Reform Act while acting in his capacity as a member of the nonprofit Hospital Board. Yet, the State of California through the FPPC is now prosecuting Mr. Burgess under the Political Reform Act for acts that took place while he was on the nonprofit Hospital Board after he was led to believe he was not subject to the Political Reform Act. If the nonprofit Hospital entity and its Board are not subject to the Political Reform Act as Burgess was led to believe and contends herein, then Burgess was not a public official at the time of the alleged violation and the Commission must rule for Burgess.

If the nonprofit Hospital Board is a subdivision of the state and subject to the Political Reform Act as the Enforcement Division contends, then the Enforcement Division's claims are constitutionally barred. Specifically, Burgess was led to believe by the nonprofit Board and its administration that the nonprofit Board was not subject to the Political Reform Act and that he was not a public official when he sat as a member of the nonprofit Hospital Board. The state cannot lead members of one of its political subdivisions to believe that they are not public officials when sitting on the political subdivision's board and then prosecute and later hold that the board members are public officials and subject to fines and criminal liability for violation of the Political Reform Act. The state cannot have it both ways. Fundamental notions of due process under the Fifth and Fourteenth Amendments prohibit the state from arbitrarily holding Mr. Burgess liable for violation of a law the state led him to believe did not apply to him. Mr. Burgess is constitutionally entitled to fair notice of the laws to which he is subject.[1] If the nonprofit board is a state subdivision as the Enforcement Division appears to contend, the state has acted arbitrarily and capriciously regarding the application of the Political Reform Act to

[1] *See also* California Constitution, Article 1, Section 7(a).

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members of the nonprofit Hospital Board and Burgess was denied fair warning of the applicability of the Political Reform Act.

Likewise, to the extent the Enforcement Division insists that the wording of Government Code Section 82048 applies to a nonprofit board member, Section 82048 is unconstitutionally vague in its wording and/or the Enforcement Division's application of the statute to Mr. Burgess. Statutes "must be sufficiently clear as to provide adequate notice of the prohibited conduct as well as to establish a standard of conduct which can be uniformly interpreted by the judiciary and administrative agencies." *(Hall v. Bureau of Employment Agencies*, 64 Cal. App. 3d 482, 491 (1976), citing *Morrison v. State Bd. Of Education,* 1 Cal. 3d 214, 231 (1969); *Cheyenne Desertrain, et al. v. City of Los Angeles*, 745 F. 3d 1147 (2014); and *Kolendar v. Lawson*, 461 U.S. 352 (1983).[2]) A law "which requires those subject to its provision to guess at its meaning is inherently violative of due process." *(Citizens for Responsible Behavior v. Superior Court,* 1 Cal. App. 4th 1013, 1032 (1991), citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).) (Emphasis added.) Here, a purported state subdivision and state statutes led Burgess to believe that the nonprofit corporation on which he served was not a governmental agency; that he was not a public official; that he was not involved in making a governmental decision; and that he was not subject to the Political Reform Act. Hospital Bylaws did not suggest he was a public official and he was not required to file a Form 700 for service on the nonprofit Hospital Board. Burgess was entitled to act in reliance on the Hospital Bylaws, and now the FPPC is prosecuting him based on the alleged violation that arose as a result of his following the promulgations of the Hospital. The applicable statute is too vague and ambiguous as interpreted and applied by the Enforcement Division to apply to Burgess for actions as a

[2] As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). The doctrine focuses both on actual notice to citizens and arbitrary enforcement of laws.

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board member of the nonprofit corporation. Given the facts in this case, if the Commission fines Mr. Burgess as a public official for actions as a nonprofit board member, doing so would be arbitrary and capricious government action in violation of due process. Burgess cannot be punished or deprived of property in violation of his Fifth and Fourteenth Amendment rights without the fundamental due process requirement of fair notice that he was a government official engaged in governmental decision-making when serving as a member of the nonprofit Board. To now punish Mr. Burgess and deprive him of property is constitutionally prohibited given the wording of the statute and the directives and bylaws of a purported subdivision of the state.

IV. ALJ WAXMAN'S CONCLUSION REGARDING RESPONDENT'S PURPORTED "ECONOMIC INTEREST" IS BOTH LEGALLY AND FACTUALLY INCORRECT.

ALJ Waxman's finding that Respondent had an "economic interest in the governmental decision" under Regulations 18703.3 and 18703.5 is also erroneous. The Proposed Decision relies exclusively on Regulations 18703.3 and 18703.5 which state as follows:

> California Code of Regulations, title 2, section 18703.3, subdivision (a), states:
>
> (a)(l) For purposes of disqualification under Sections 87100 and 87103, a public official has an economic interest in any person from whom he or she has received income, including commission income and incentive compensation as defined in this regulation, aggregating five hundred dollars ($500) or more within 12 months prior to the time when the relevant governmental decision is made. A public official's income includes income which has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income.
>
> (2) Parent, Subsidiary, Otherwise Related Business Entity. An official has an economic interest in a business entity which is a parent or subsidiary of, or is otherwise related to, a business entity in which the official has an interest as defined in Section 87103(c). 'Parents, subsidiaries, and otherwise related business entities' are defined in Regulation 18703. 1 (d).
>
> (3) In addition to having an economic interest in any business entity from which the official has received income of five hundred ($500) or more within 12 months prior to the time when the relevant governmental decision is made, the official has a source-of-income economic interest in all of the following:
>
> (A) Any individual owning a 50 percent or greater interest in that business entity.

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(B) Any individual, regardless of the extent of the individual's ownership interest in that entity, who has the power to direct or cause the direction of the management and policies of the business entity.

California Code of Regulations, title 2, section 18703.5 states:

For purposes of disqualification under Government Code sections 87100 and 87103, a public official has an economic interest in his or her personal finances and those of his or her immediate family. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing.

ALJ Waxman concluded that Respondent Burgess had a purported "economic interest" pursuant to these Regulations based, in part, on the erroneous finding that "[i]n April of 2010, Respondent and his son were the sole owners of BNA." Indeed, as acknowledged by the Enforcement Division, the undisputed evidence is that Respondent Burgess does not own BNA. He is not a shareholder, nor does he have any financial interest in BNA. He receives no compensation, income or salary from BNA. Thus, ALJ Waxman's conclusion is factually incorrect and unsupported by the record. And while it may be true that Respondent served as president and CEO of the Corporation as the Enforcement Division contends, that fact does not support ALJ Waxman's legal conclusion that Respondent had an "economic interest" under the Regulations he relied upon to make that determination. For these reasons, it is undisputed ALJ Waxman's analysis and findings in the Proposed Decision regarding economic interest are both factually and legally incorrect.

V. IT WAS ALSO NOT REASONABLY FORESEEABLE THAT RESPONDENT BURGESS' ECONOMIC INTEREST WOULD BE MATERIALLY AFFECTED.

A public official does not have a conflict of interest under the Act unless the "government decision" in which he or she participates has a "reasonably foreseeable material financial effect" on his or her interests. Here, ALJ Waxman decided "reasonable foreseeability" based on the wrong version of Regulation 18706. ALJ Waxman's decision must be rejected for this reason alone. As explained more fully herein below, ALJ Waxman's decision was based in part on a presumption of "reasonable foreseeability" which does not exist in the 2010 version of

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the Regulation, which the Enforcement Division concedes should have been applied. Not only did ALJ Waxman rely upon this presumption to conclude that the "reasonable foreseeability" element had been met, but the Proposed Decision also expressly states that Respondent failed to rebut this "presumption." (*See e.g.* Proposed Decision, p. 11, Section 14a&b ("Respondent did not rebut the presumption of reasonable foreseeability")). And while ALJ Waxman may have also analyzed the "reasonable foreseeability" element under subdivision (b) of Regulation 18706, that fact is of no consequence, since he again performed that analysis under the wrong version of the Regulation – the 2014 version rather than the 2010 version in effect when the alleged violation occurred. As set forth more fully below, the 2014 version of subsection (b) relied upon by ALJ Waxman has entirely different standards and factors than the 2010 version such that the Proposed Decision must be rejected for this reason as well.

Moreover, it cannot be said, under any version of the Regulations that the decision had a reasonably foreseeable material financial effect on Respondent Burgess' financial interests. To the contrary, the undisputed evidence is that Respondent Burgess does not own BNA. He is not a shareholder, nor does he have any financial interest in BNA. He receives no compensation, income or salary from BNA and therefore did not stand to lose or gain a single penny in connection with the nonprofit Board's vote on whether to change document storage companies. Clearly therefore, it was not foreseeable that Respondent Burgess financial interest would be materially affected.

VI. THE AGENCY CANNOT INVOKE THE DISPOSITION PROVIDED FOR IN GOVERNMENT CODE SECTION 11517(c)(2)(C) AS RECOMMENDED BY THE ENFORCEMENT DECISION.

The Enforcement Division admits that the Proposed Decision was analyzed and decided by ALJ Waxman based on the wrong version of the Regulations. Rather than recommend that the Commission reject the Proposed Decision as it should have done, the Enforcement Division instead asks this Commission just to delete the incorrect Regulations and standards from ALJ Waxman's Proposed Decision and replace them with what they perceive to be the applicable

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Regulations. By doing so, the Enforcement Division is effectively asking this Commission to change the entire legal basis for the Proposed Decision.

While Government Code Section 11517, subdivision (c)(2)(C) certainly allows the Commission to make "technical or other minor changes" such as the "typographical errors" identified by the Enforcement Division on page 19 of its Brief, it does not allow the Commission to change the legal basis of the Proposed Decision. In fact, Government Code Section 11517 expressly states that such changes are " limited to a clarifying change or a change of a similar nature *that does not affect the factual or legal basis of the proposed decision*." (Gov. Code Section 11517 (subd. (c)(2)(C) (Emphasis added).). *See also Ventimiglia v. Board of Behavioral Sciences*, 168 Cal. App. 4th 296 (2008) (Abuse of discretion for agency to make changes to the proposed decision by the administrative law judge that affect the factual or legal basis of the proposed decision under Section 11517(c)(2)(C)).

Here, the proposed changes by the Enforcement Division go far beyond what is permitted by Section 11517(c)(2)(C) as they clearly affect the "factual or legal basis" of the Proposed Decision. The Enforcement Division is asking this Commission to strike Regulations that were analyzed and relied upon by ALJ Waxman to form his Proposed Decision. The Enforcement Division is also asking this Commission to remove other Regulations that served as the basis for ALJ Waxman's opinions and replace them with an entirely different version of the Regulation. By definition therefore, the proposed changes "affect the legal basis of the proposed decision."

Moreover, the 2014 version of Regulation 18706 that ALJ Waxman analyzed and relied upon to conclude that the "reasonable foreseeability" element was met contains a presumption that the 2010 version of the same Regulation does not. Specifically, the 2014 version of Regulation 18706 provides that "a financial effect on an economic interest is presumed to be reasonably foreseeable if the economic interest is a named party in, or the subject of, a governmental decision before the official or the official's agency." (Regulation 18706(a)). Not only did ALJ Waxman rely upon this presumption to conclude that the "reasonably foreseeable" element had been met, but the Proposed Decision also states that Respondent did not rebut the

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presumption. *See e.g.* Proposed Decision, p. 11, Section 14a&b ("Respondent did not rebut the presumption of reasonable foreseeability").

And while ALJ Waxman may have also analyzed the "reasonable foreseeability" element under subdivision (b) of Regulation 18706, that fact is of no consequence, since he again performed that analysis under the wrong version of the Regulation. In fact, the 2014 version of subsection (b) that was relied upon by ALS Waxman is entirely different than the 2010 version that the Enforcement Division asks this Commission to replace it with. For example, the 2014 version of 18706(b) relied upon by ALS Waxman states that "if a financial effect can be recognized as a 'realistic possibility' ... it is reasonably foreseeable" whereas the 2010 version that the Enforcement Division contains no such language. The 2010 version also requires a "*material*" financial effect whereas the 2014 version that was relied upon by ALS Waxman contains no such language. Moreover, the two versions of Regulation 18706(b) contain an entirely different set of factors as follows:

Regulation 18706 (2010)	Regulation 18706 (2014)
(1) The extent to which the official or the official's source of income has engaged, is engaged, or plans on engaging in business activity in the jurisdiction;	(1) The extent to which the occurrence of the financial effect is contingent: upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.
(2) The market share held by the official or the official's source of income in the jurisdiction;	(2) Whether the public official should anticipate a financial effect on his or her economic interest as a potential outcome under normal circumstances when using appropriate due diligence and care.
(3) The extent to which the official or the official's source of income has competition for business in the jurisdiction;	(3) Whether the public official has an economic interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has an economic interest.
(4) The scope of the governmental decision in question; and	(4) Whether a reasonable inference can be made that the financial effects of the governmental
(5) The extent to which the occurrence of the material financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.	

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> decision on the public official's economic interest could compromise the public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.
>
> (5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's economic interests, including whether the economic interest may be entitled to compete or be eligible for a benefit resulting from the decision.
>
> (6) Whether the public official has the type of economic interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position.

Thus, contrary to the Enforcement Division's claim, these are not mere minor technical changes, but rather changes to the entire legal basis of the Proposed Decision. The Enforcement Division's request is clearly prohibited and should not be granted.

The Enforcement Division's requested changes relating to the "economic interest" also affect the legal basis of the Proposed Decision. Specifically, the Enforcement Division seeks to delete from the Proposed Decision the entire legal analysis and basis for ALJ Waxman's conclusion that this element was met — Regulations 18703.3 and 18703.5 — and substitute in its place a citation to at least one other Regulation — Regulation 18703.1 — which was never even mentioned in the Proposed Decision. The Enforcement Division tries to characterize this as a mere clarifying change by arguing that ALJ Waxman's analysis and legal conclusions regarding whether Respondent Burgess had a qualifying economic interest were not based upon Regulations 18703.3 and 18703.5, but rather the law articulated in Sections 87100 and 87103, subdivision (d). Contrary to the Enforcement Division's assertion however, the only legal basis that ALJ Waxman referenced in support of his ultimate legal conclusion that Respondent had an "economic interest" were Regulations 18703.3 and 18703.5. (*See e.g.* **Exh. "A"**, Proposed Decision, pp. 8&9, Section 11). In fact, Section 11 of the Proposed Decision does not even address Government Code Sections 87100 and 87103 subdivision (d), let alone rely upon them to arrive at its conclusion on the issue of "economic interest." Moreover, and contrary to the

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Enforcement Division's contention at page 16 lines 10-13 of its brief, not only does ALJ Waxman discuss Respondent's "source of income", but his opinion that Respondent had an "economic interest" was based on that erroneous fact — "[i]n April of 2010, Respondent and his son were the sole owners of BNA." Contrary to the Enforcement Divisions contention therefore, removing Regulations 18703.3 and 18703.5 from the Proposed Decision and replacing them with Government Code Section 87103 is more than a mere "clarifying change" — it changes the entire legal basis for ALJ Waxman's Proposed Decision and is clearly prohibited.

The Enforcement Division concedes that this matter was analyzed and decided by ALJ Waxman based on the wrong law. The Commission must follow the law. It now either needs to reject the decision outright or, after affording the parties to the opportunity to make oral and written argument, make its own decision based on the correct law.[3] (Govt. Code Section 11571(E).) Under no circumstances however, can it adopt the Proposed Decision by substituting in its own legal basis for the decision. *See e.g. Ventimiglia v. Board of Behavioral Sciences*, 168 Cal. App. 4th 296 (2008) (Petition for writ of administrative mandate granted where changes to the proposed decision affected the factual or legal basis of the proposed decision).

VII. THE FACTS AND CIRCUMSTANCES OF THIS CASE DO NOT SUPPORT THE IMPOSITION OF THE MAXIMUM PENALTY OF $5,000

If for some reason the Commission chooses to adopt the Proposed Decision in some form, the proposed penalty needs to be reduced as the facts and circumstances of this case do not support the imposition of the maximum penalty of $5,000.

In determining the appropriate penalty for a particular violation of the Act, the Enforcement Division considers the facts and circumstances of the violation in context of the factors set forth in Regulation 18361.5, subdivision (d)(1)-(6): the seriousness of the violations; the presence or lack of intent to deceive the voting public; whether the violation was deliberate,

[3] Mr. Burgess was also denied due process and a right to a full and fair opportunity to be heard at the Administrative Hearing. Mr. Burgess intended to present additional documents and evidence in his defenses but ALJ Waxman denied him of that opportunity, *inter alia*, accusing him of trying to "flood the record."

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negligent, or inadvertent; whether the respondent(s) demonstrated good faith in consulting with Commission staff; whether there was a pattern of violations; and whether upon learning of the violation the respondent voluntarily filed amendments to provide full disclosure.

Here, Respondent made no attempt to deceive or mislead anyone. In fact, he asked and was given permission by the Board's Executive Secretary to pass out the packets to the other Board members. Nor was the alleged violation deliberate or even negligent. Respondent did not believe, nor would any reasonable person have believed, that he was a "public official" within the meaning of Government Code Section 82048 while serving on the nonprofit board of the Hospital. The Hospital *is a 501(c)(3) California nonprofit corporation*, which took the position, *in its own By-Laws*, that the Board Members were not "public officials." Consistent with that position, the Hospital also never required Respondent or any of its other Board Members to file a Form 700-Statement of Economic Interest or even adopt a Conflict of Interest Code *until after Respondent's alleged incident*.

Nor did Respondent have any reason to believe that he had an "economic interest" in the agreement that was being considered by the Board. He does not own any interest in, or receive any salary, income or compensation from, BNA. He did not stand to gain or lose a single penny from the contract that was before the Board. Furthermore, as the Proposed Decision even concedes, Respondent Burgess has had a "long and distinguished career in public service and private enterprise" with no prior history of enforcement actions or record of violations. He served on the Banning City Counsel of 12 years and his record is impeccable. If any penalty is imposed for this single, isolated incident therefore, it should be nominal (i.e. $100.00).

Indeed, the facts and circumstances of this case are a far cry from the cases that the Enforcement Division offered as "evidence" to support their request for the maximum penalty of $5,000.00. For example, the Respondent *In the matter of Nelson E. Olivia, FFPC No. 11/863 (Default)* was given the maximum $5,000 penalty because he "deliberately" violated fourteen (14) different violations of the Act, including "executing 17 contracts totaling $2,889,000.00 with [a private company he previously owned but transferred to his daughter], while at the same time accepting $234,775.96 in gifts from that same company." Likewise, *In the Matter of Floyd*

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Leeson; FPPC No. 07/120 (Stipulation) involved a *pattern of violations* in which the Respondent *repeatedly* participated in making governmental decisions involving a company which he had a *significant* financial interest and made several inappropriate statements in emails to the executive of the company. Similarly, *In the Matter of David Cole; FPPC No. 06/1148(Default)*, involved *a pattern of 23 separate violations from 2003 through 2007* and *repeatedly making* governmental decisions by voting on at least sixteen (16) different matters involving a *significant source* of income to the Respondent.

Here, by contrast, Respondent Burgess had *one isolated incident* in his *over 12 years of public service* of handing out materials, *with the permission of the Executive Secretary*, while serving on the board of *a non-profit corporation* whose *Bylaws effectively stated that its Board members were not Public Officials* and *never required them to file Statement of Economic Interest Form* and had not *adopted a Conflict of Interest Code*, until after the alleged incident. *None of the materials were ever even reviewed by the other Board Members* and *Respondent Burgess voluntarily abstained from voting*. The Enforcement Division cannot in good faith or with a straight face contend that the authorities it has relied on are analogous to the facts in this case. The facts of this case do not warrant any penalty, much less the maximum $5,000 penalty. If any penalty is imposed, it should be nominal (i.e. $100.00).

Respectfully submitted,

DATE: January 30, 2015

SLOVAK BARON EMPEY MURPHY & PINKNEY LLP

By: _____

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EXHIBIT

A

BEFORE THE
FAIR POLITICAL PRACTICES COMMISSION
STATE OF CALIFORNIA

In the Matter of FRANK J. BURGESS Respondent.	Case No. 12/516 OAH No. 2014060674

PROPOSED DECISION

This matter came on regularly for hearing on December 8 and 9, 2014, in Los Angeles, California, before H. Stuart Waxman, Administrative Law Judge, Office of Administrative Hearings, State of California.

The Fair Political Practices Commission (Complainant or FPPC) was represented by Angela J. Brereton, Senior Commission Counsel, and Adam Edward Silver, Commission Counsel.

Frank J. Burgess was present and represented himself.

Oral and documentary evidence was received. The record was closed on December 9, 2014, and the matter was submitted for decision.

Pursuant to California Code of Regulations, title 2, section 18361.4, subdivision (e), the Accusation in this case was prepared and served following a February 18, 2014 finding of probable cause that Respondent violated provisions of the Political Reform Act (Gov. Code, § 81000 et seq.).

FACTUAL FINDINGS

1. San Gorgonio Memorial Hospital (hospital) is a 71-bed acute care hospital located in Banning, California. It operates as a California nonprofit 501(c)(3) public benefit corporation. It is owned by the San Gorgonio Memorial Healthcare District (district), a political subdivision of the State of California. The hospital leases its land, building, and equipment from the district under a long-term lease.

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2. The hospital is, and at all relevant times was, governed by two boards. The San Gorgonio Memorial Healthcare District Board (district board) consists of five elected members. It is a public agency and, as such, each member is a public official who must file with the FPPC an annual "Form 700" Statement of Economic Interests, disclosing sources of income and other economic interests that could actually or potentially trigger a conflict of interest with the member's official duties. The San Gorgonio Memorial Hospital Board (hospital board) is comprised of 13 members, five of whom are the district board members. Because the other eight members sit with the five district board members, the hospital board is also considered a public agency, and all 13 board members must file Statements of Economic Interests annually.

3. From June 2009 through December 2010, Respondent was a member of the district board. As a member of that board, he was also a member of the hospital board. Prior to his sitting on the district and hospital boards, Respondent was a member of the Banning City Council for 12 years.

4. Respondent has also been a businessman for over 40 years. At all relevant times, he was President and Chief Executive Officer (CEO) of Banning Van & Storage, Inc., dba Burgess North American (BNA), a company engaged in the business of moving and storage. Initially incorporated in 1964, BNA's officers included Respondent as President and his wife as Secretary. As of January 2010, Respondent's son, Todd Burgess was BNA's secretary following Mrs. Burgess's death. Respondent oversaw the Banning office. Todd Burgess oversaw the Palm Springs office.

5. Respondent regularly reported his financial interest in BNA in all of his annual Statements of Financial Interests.

6. In April 2005, the hospital entered into a contract with BNA for BNA to store and manage the hospital's records. The term of the contract was indefinite, and the contract did not include an expiration date. The hospital paid BNA for its services pursuant to a specified Schedule of Charges. BNA's annual income from the account exceeded $30,000. The contract was in full force and effect at all relevant times.

7. In or around April 2010, the hospital board considered reducing its medical record storage and management costs either by negotiating a new rate with BNA or by terminating the contract with BNA and entering into a contract with another company. A comparison was made between BNA and a company named Docu-Trust. The results of that comparison showed that the hospital could realize a 24.54 percent annual savings, totaling $7,767.95, by contracting with Docu-Trust instead of BNA. An item was placed on the hospital board's agenda for the April 6, 2010 meeting for the hospital board to decide whether to terminate BNA's contract in favor of one with Docu-Trust.

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8. Prior to the April 6, 2010 meeting, Respondent and/or his son prepared a 10-page packet of materials relating to the hospital board's choice between BNA and Docu-Trust. The packet contained eight sections, including but not limited to "Questions to be addressed Before voting [*sic*];" "Fees due prior to removal Of Containers [*sic*]; "Corrected annual cost comparison" [*sic*]; and a schedule of charges for the hospital's account.

9. On April 6, 2010, the district board met before the meeting of the hospital board. The two meetings were separated by a dinner break. During the dinner break, Respondent placed the packet of materials at the place of each of the 13 members of the hospital board. Respondent had not attempted to have the packet placed with the agenda materials that had been prepared for the meeting. Roberta (Bobbi) Duffy, the executive assistant to the hospital's CEO, saw Respondent distributing the packet for the hospital board members and told him she had to make a copy of it. Respondent gave her one of the packets for that purpose.

10. In April 2010, Jerilynn Sue Kaibell was the Chair of the hospital board. She continues to hold that position today. Prior to the April 6, 2010 board meeting, Dr. Kaibell[1] spoke with Respondent concerning the agenda item relating to his company and told him he should refrain from the discussion and abstain from the vote due to his conflict of interest. She recommended to Respondent that he be absent from the room during the discussion and vote. Dr. Kaibell observed Respondent distributing his packet before the hospital board meeting, and she chastised him for lobbying the board members on his company's behalf. When the agenda item was called, Respondent did not exit the room. Instead, he remained in his board member's seat, and he attempted to speak to the board members about the packet while holding the packet up in his hand. Dr. Kaibell repeatedly called him out of order because of his conflict of interest. Respondent abstained from the vote, and the contract with Docu-Trust was unanimously approved with abstentions by Respondent and one other board member.

11. Respondent admits he prepared and distributed the packet for the hospital board members, but claims he did so because the chart used to compare BNA and Docu-Trust was incomplete, inaccurate, and untrue. At the administrative hearing, Respondent continuously argued that he had not been dishonest in connection with his actions relating to the hospital board's April 6, 2010 meeting. Respondent's protestations in that regard are misplaced. He is not alleged to have been dishonest.

12. Respondent raised a number of issues in his defense, none of which was relevant to the sole issue alleged in the Accusation, specifically, that he attempted to use his official position to influence a governmental decision in which he had a financial interest. Respondent now describes his actions on April 6, 2010 as "a big mistake." (Respondent's term.) He regrets having made it.

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[1] Dr. Kaibell is a doctor of chiropractic.

LEGAL CONCLUSIONS

1. Cause exists to impose a monetary penalty against Respondent pursuant to Government Code sections 87100 and 83116, subdivision (c), for attempting to use his official position to influence a governmental decision in which he had a financial interest, as set forth in Factual Findings 1 through 12.

2. Complainant bears the burden of proof in this case. (*Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 113.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115; Cal. Code Regs., tit. 2, § 18361.5, subd. (c).)

3. Government Code section 87100 states:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

4. Government Code section 83116 states:

> When the [Fair Political Practices] commission determines there is probable cause for believing this title has been violated, it may hold a hearing to determine if a violation has occurred. Notice shall be given and the hearing conducted in accordance with the Administrative Procedure Act (Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2, Government Code). The commission shall have all the powers granted by that chapter. When the commission determines on the basis of the hearing that a violation has occurred, it shall issue an order that may require the violator to do all or any of the following:
>
> (a) Cease and desist violation of this title.
>
> (b) File any reports, statements, or other documents or information required by this title.
>
> (c) Pay a monetary penalty of up to five thousand dollars ($5,000) per violation to the General Fund of the state. When the Commission determines that no violation has occurred, it shall publish a declaration so stating.

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5. Respondent argued that he is not subject to the provisions of Government Code sections 87100 and 83116, subdivision (c) because he was serving on the board of directors of a private, non-profit corporation at the time he distributed the packet, and that the hospital board was not subject to the Political Reform Act. He is incorrect. Respondent's duties as a member of the district board included his service on the hospital board. Because the district board members all served on the hospital board, all hospital board members were required to submit Statements of Economic Interests annually.

6. Government Code section 87103 states in pertinent part:

> A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following:
>
> (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars ($2,000) or more.
>
> [¶] . . . [¶]
>
> (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars ($500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
>
> (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. . . .

7. California Code of Regulations, title 2, section 18702.2, states:

> A public official "participates in making a governmental decision," except as provided in Title 2, California Code of Regulations, section 18702.4, when, acting within the authority of his or her position, the official:
>
> (a) Negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

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(b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:

(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A).

8. Complainant offered a six-element analytical construct by which to determine whether an individual has violated Government Code section 87100. Although the use of the above construct is not mandated by statute or regulation, it serves as a useful tool in determining liability under that statute. Accordingly, each of the above elements is analyzed below. The elements are:

a. The individual must have been a public official as defined by the Political Reform Act.

b. The individual must have made, participated in making, or attempted to use his/her official position to influence a governmental decision.

c. The individual must have had an economic interest in the business entity in question.

d. The individual's economic interest must have been directly involved in the governmental decision.

e. The financial effect of the decision on the individual's economic interest was material.

f. The material financial effect was reasonably foreseeable.

9. *Was Respondent a public official?* Yes. Government Code section 82048 defines a "public official" as "every member, officer, employee or consultant of a state or local government agency." The district was a political subdivision of the State of California. As a member of the district's board of directors, Respondent was a public official. Because Respondent's membership on the hospital board was directly derivative of his district board membership, he (along with the other hospital board members) was a public official even when sitting on the hospital board.

10. *Did Respondent make, participate in making, or attempt to use his official position to influence a governmental decision?* Yes.

a. California Code of Regulations, title 2, section 18702.3, subdivision (a), states:

> With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

b. An exception to this rule exists for a public official who acts as a member of the public in a matter relating solely to his/her personal interests: California Code of Regulations, title 2, section 18702.4, provides in relevant part:

> (a) Making or participating in making a governmental decision shall not include:
>
> [¶] . . . [¶]
>
> (2) Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official's personal interests as defined in Title 2, California Code of Regulations, section 18702.4(b)(1) . . .
>
> [¶] . . . [¶]
>
> (b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:
>
> (1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:
>
> [¶] . . . [¶]

(B) A business entity wholly owned by the official or members of his or her immediate family.

c. Here, Respondent used his official position to enter the meeting room between board meetings, distribute his packets, remain in his official seat during the discussion and the vote, and verbally lobby the hospital board to retain his company as the hospital's record storage provider. Respondent's conduct on April 6, 2010 does not qualify for the exception referenced in subdivision (b) above. By his conduct, he acted in his official capacity and not as a member of the general public.

11. *Did Respondent have an economic interest in the governmental decision?* Yes.

a. California Code of Regulations, title 2, section 18703.3, subdivision (a), states:

(a)(1) For purposes of disqualification under Sections 87100 and 87103, a public official has an economic interest in any person from whom he or she has received income, including commission income and incentive compensation as defined in this regulation, aggregating five hundred dollars ($500) or more within 12 months prior to the time when the relevant governmental decision is made. A public official's income includes income which has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income.

(2) Parent, Subsidiary, Otherwise Related Business Entity. An official has an economic interest in a business entity which is a parent or subsidiary of, or is otherwise related to, a business entity in which the official has an interest as defined in Section 87103(c). "Parents, subsidiaries, and otherwise related business entities" are defined in Regulation 18703.1(d).

(3) In addition to having an economic interest in any business entity from which the official has received income of five hundred ($500) or more within 12 months prior to the time when the relevant governmental decision is made, the official has a source-of-income economic interest in all of the following:

(A) Any individual owning a 50 percent or greater interest in that business entity.

(B) Any individual, regardless of the extent of the individual's ownership interest in that entity, who has the power to direct or cause the direction of the management and policies of the business entity.

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b. California Code of Regulations, title 2, section 18703.5 states:

> For purposes of disqualification under Government Code sections 87100 and 87103, a public official has an economic interest in his or her personal finances and those of his or her immediate family. A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing.

c. In April 2010, Respondent and his son were the sole owners of BNA. As president and CEO of the corporation, Respondent had an economic interest in the hospital board's decision whether to terminate the hospital's contract with BNA.

12. *Was Respondent's economic interest directly involved with the governmental decision?* Yes.

a. California Code of Regulations, title 2, section 18704.1, subdivision (a), states in relevant part:

> (a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official's agency when that person, either directly or by an agent:
>
> [¶] . . . [¶]
>
> (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.

b. Respondent's company was the subject of the April 6, 2010 agenda item relating to the hospital's record storage. As such, Respondent's economic interest was directly involved with the governmental decision.

13. *Was the financial effect of the governmental decision material to Respondent's economic interest?* Yes.

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a. California Code of Regulations, title 2, section 18705.1, states in pertinent part:

> (a) Introduction.
>
> (1) If a business entity in which a public official has an economic interest is directly involved in a governmental decision (see Regulation 18704.1(a)), use the standards in subdivision (b) of this regulation.
>
> (2) If a business entity in which a public official has an economic interest is indirectly involved in a governmental decision (see Regulation 18704.1(b)), use the standards in subdivision (c) of this regulation.
>
> (b) Directly involved business entities.
>
> (1) General Rule: Unless the exception in subdivision (b)(2) of this regulation applies, the financial effects of a governmental decision on a business entity which is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity.
>
> (2) Exception: If the public official's only economic interest in the business entity is an investment interest (see Section 87103(a)), and the public official's investment in the business entity is worth $25,000 or less, apply the materiality standards in either of the following provisions, as applicable:
>
> (A) Subdivision (c)(1) of this regulation if the business entity is listed in the Fortune 500, or if not listed in the Fortune 500, has revenues that are no less than the revenues of the business entity that ranks 500th in the Fortune 500 list.
>
> (B) Subdivision (c)(2) of this regulation if the business entity is listed on the New York Stock Exchange, or if not listed on the New York Stock Exchange, for its most recent fiscal year had net income of no less than $2.5 million.

b. Respondent had more than an investment interest in BNA. He was the company's president and CEO, and he had been so since 1964. The exception in California Code of Regulations, title 2, section 18705.1, subdivision (b)(2) does not apply in this case, and the presumption in subdivision (b)(1) is not rebutted.

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14. *Was the material financial effect of the governmental decision on Respondent's economic interest reasonably foreseeable?* Yes.

a. California Code of Regulations, title 2, section 18706, subdivision (a), states:

> (a) Economic Interest Explicitly Involved: A financial effect on an economic interest is presumed to be reasonably foreseeable if the economic interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. An economic interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the economic interest, and includes any governmental decision affecting a real property economic interest as described in Regulation 18705.2(a)(1)-(6).

b. The governmental decision in this case involved the revocation, termination, or continuance of the contract between the hospital and Respondent's company. Respondent did not rebut the presumption of reasonable foreseeability.

c. Even if Respondent's economic interest in the decision was not explicitly involved in the decision, the financial effect of the decision on his economic interest would nonetheless have been reasonably foreseeable. California Code of Regulations, title 2, section 18706, subdivision (b), states:

> Economic Interest Not Explicitly Involved in Decision: A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. In determining whether a governmental decision will have a reasonably foreseeable financial effect on an economic interest other than an interest described in subdivision (a) above, the following factors should be considered. These factors are not intended to be an exclusive list of all the relevant facts that may be considered in determining whether a financial effect is reasonably foreseeable, but are included as general guidelines.
>
> (1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.
>
> (2) Whether the public official should anticipate a financial effect on his or her economic interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

(3) Whether the public official has an economic interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has an economic interest.

(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's economic interest could compromise the public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.

(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's economic interests, including whether the economic interest may be entitled to compete or be eligible for a benefit resulting from the decision.

(6) Whether the public official has the type of economic interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position.

(d) Respondent stood to lose a lucrative contract with the hospital if the hospital board voted to change storage companies to Docu-Trust. Knowing this, he prepared and distributed his packet to the other board members and then attempted to orally lobby them at the meeting before the vote. Respondent not only had an economic interest in the vote, the financial effect on that interest by the board's decision was more than reasonably foreseeable.

15. Cause for imposing a monetary penalty on Respondent having been established, several factors must be considered in determining the amount of the penalty.

16. California Code of Regulations, title 2, section 18361.5, subdivision (d), states:

Factors to be Considered by the Commission. In framing a proposed order following a finding of a violation pursuant to Government Code section 83116, the Commission and the administrative law judge shall consider all the surrounding circumstances including but not limited to:

(1) The seriousness of the violation;

(2) The presence or absence of any intention to conceal, deceive or mislead;

(3) Whether the violation was deliberate, negligent or inadvertent;

(4) Whether the violator demonstrated good faith by consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114(b);

(5) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Political Reform Act or similar laws; and

(6) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.[2]

17. The violation was serious in that it involved Respondent's direct attempt to influence the hospital board into maintaining a lucrative contract with the company of which he had been president for 46 years. Although he made no attempt to deceive or mislead the board or to conceal any fact from it, his actions were neither negligent nor inadvertent. Respondent acted deliberately with no attempt or intent to consult the Commission staff or any other government agency before preparing and distributing the packet and attempting to lobby the board members. In fact, he did so over the repeated admonishments of the Chair. The only mitigating factors are the fact that Respondent's actions constituted a single, isolated incident in an otherwise long and distinguished career in public service and private enterprise, and his remorse for his actions on April 6, 2010. However, in light of the nature and blatancy of Respondent's conduct, those factors are insufficient to warrant a reduction of the monetary penalty from the maximum amount allowable by law, specifically, $5,000 for the single violation. (Gov. Code, § 83116, subd. (c).)

ORDER

Respondent, Frank J. Burgess, shall pay a penalty of $5,000 to the General Fund of the State of California within 90 days of the effective date of this Decision.

Dated: December 18, 2014

H. Stuart Waxman

H. STUART WAXMAN
Administrative Law Judge
Office of Administrative Hearings

[2] Factor No. 6 is not applicable to this case.

Slovak Baron Empey Murphy & Pinkney LLP
1800 East Tahquitz Canyon Way
Palm Springs, CA 92262

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am employed in the County of Riverside, State of California. I am over the age of 18 years and not a party to the within action. My business address is Slovak, Baron Empey Murphy & Pinkney LLP, 1800 East Tahquitz Canyon Way, Palm Springs, California 92262.

On January 30, 2015, I served the foregoing document described as

In the Matter of Frank Burgess – IN THE MATTER OF FRANK J. BURGESS — OAH NO. 2014060674 / FPPC NO. 12/516:
RESPONDENT'S BRIEF IN RESPONSE TO OPENING BRIEF OF THE ENFORCEMENT DIVISION OF THE FAIR POLITICAL PRACTICES COMMISSION RE: PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE H. STUART WAXMAN

[X] **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at PALM SPRINGS, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
[X] **(BY OVERNIGHT MAIL)** I caused such envelope to be delivered via UPS, Overnight Delivery, to the office of the above addressee.
[X] **(BY ELECTRONIC MAIL)** I am personally and readily familiar with the business practice of the firm for the preparation and processing of documents in portable document format (PDF) for emailing. I prepared said document(s) in PDF and then caused such document(s) on or about the date set forth above to be served by electronic mail to the below addressee(s) to the last known e-mail address as set forth herein from my e-mail address of goldsmith@sbemp.com and no undeliverable notice was received.

on all interested parties in this action by placing a true copy thereof addressed as follows:

Overnight and Electronic Mail Delivery	**By Electronic Mail and U.S. First Class Mail Delivery:**
John Kim, Commission Assistant 428 J Street, Suite 620 Sacramento, CA 95814 jkim@fppc.ca.gov	Angela J. Brereton, Senior Commission Counsel Fair Political Practices Commission 428 J Street, Suite 620 Sacramento, CA 95814 abrereton@fppc.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 30, 2015, at Palm Springs, California.

Andrea Goldsmith